Pau Ming Mortgage Sdn Bhd v The Registrar, Land & Survey Department, Samarahan & Ors

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO 24-128 OF 1997(II)
MUHAMMAD KAMIL J
14 JULY 1998

Land Law *— Restraints on dealings — Caveats — Caveatable interest — Pledge over land — Whether pledge constituted an 'unregistered agreement' enabling caveator to have a caveatable interest in land — Land Code (Sarawak Cap 81) s 173(a)*

The second defendant took a loan from the plaintiff secured by a pledge of the former's land ('the land'). Pursuant to the pledge, the plaintiff lodged a caveat against the land ('the caveat'). The first defendant notified the plaintiff of an application for the registration of a memorandum of transfer taken out by the second and third defendants in respect of the land. The plaintiff applied for the continuance of its caveat until the trial of the plaintiff's case against the second defendant on the ground that the pledge should be deemed as an 'unregistered agreement' and therefore would clearly come within the scope of s 173(a) of the Land Code (Sarawak Cap 81) ('the Land Code'). The third defendant objected to the application.

Held, allowing the application:

The pledge given by the second defendant would unmistakably constitute an 'unregistered agreement' as provided in s 173(a) of the Land Code, enabling the plaintiff to have a caveatable interest in the land. Moreover, the second defendant had expressly and unambiguously pledged his shares of the land to the plaintiff as security for the loan given to him by the plaintiff. For the third defendant to come to court at this point of time and to impute that the plaintiff had no caveatable interest would clearly undermine all the attributes of fairness and justice (see p 128D–F).

[Bahasa Malaysia summary

Defendan kedua telah mengambil pinjaman dari plaintif yang dijamin oleh cagaran tanah defendan kedua ('tanah tersebut'). Menurut cagaran, plaintif telah mengemukakan suatu kaveat terhadap tanah tersebut ('kaveat tersebut'). Defendan pertama telah memberitahu plaintif tentang suatu permohonan untuk pendaftaran memorandum pindahmilik yang diambil oleh defendan-defendan kedua dan ketiga berkaitan dengan tanah tersebut. Plaintif memohon supaya kaveat diteruskan sehingga perbicaraan kes plaintif terhadap defendan kedua atas alasan bahawa cagaran haruslah dianggap sebagai 'perjanjian tak berdaftar' dan dengan itu jelas dirangkumi oleh s 173(a) Kanun Tanah (Sarawak Bab 81) ('Kanun Tanah tersebut'). Defendan ketiga membantah permohonan tersebut.

Diputuskan, membenarkan permohonan:

Cagaran yang diberikan oleh defendan kedua memang jelas membentuk suatu 'perjanjian tak berdaftar' seperti yang diperuntukkan dalam s 173(a) Kanun Tanah tersebut, yang membolehkan plaintif mempunyai kepentingan boleh kaveat dalam tanah tersebut. Tambahan pula, defendan kedua telah secara nyata dan jelas menjamin bahagiannya dalam tanah tersebut kepada plaintif sebagai cagaran untuk pinjaman yang diberikan kepadanya oleh plaintif. Sekiranya defendan ketiga menghadiri mahkamah pada masa ini dan mengatakan bahawa plaintif tidak mempunyai kepentingan boleh kaveat jelas akan menjejaskan kesemua ciri keadilan (lihat ms 128D-F).]

Notes

For cases on caveatable interest, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2328–2380.

Cases referred to

Cheong Kong Enterprise Co Sdn Bhd v Foong Seong Mines Ltd & Ors [1969] 2 MLJ 246 (refd)

Ling Tee Huah Credit & Leasing Sdn Bhd & Ors v Lii Tat Credit Mortgage Sdn Bhd & Anor [1990] 1 MLJ 58 (refd)

R & I Securities Sdn Bhd v Syarikat Tanaman dan Perusahaan Perak Sdn Bhd [1988] 3 MLJ 41 (refd)

Leie Siew Nyuk v Tong Kwong Feedmills Co Sdn Bhd Originating Motion No KG 1 of 1984 (High Court, Kuching) (refd)

Teng Hung Ping v Hoan Siew Choo & Ors [1993] 2 CLJ 662 (refd)

Legislation referred to

Land Code (Sarawak Cap 81) ss 173(a), 178

Bexter Michael (*Ee Shu Yen* with him) (*Ee & Lim*) for the plaintiff.
George Chapman (*Lim Tan & Partners*) for the third defendant.

Muhammad Kamil J: This is the plaintiff's application dated 3 September 1997 (encl 3), asking for an order, inter alia, that the Caveat Instrument No L715/1997 lodged by the plaintiff and registered at the Samarahan Land Registry, against all that parcel of land situated at Sungai Bakar, 27th Mile Kuching/Serian Road, Serian containing an area of 2,752 square metres, more or less, and described as Lot 478 Block 1 Bukar-Sadong Land District, shall not lapse until the trial of the plaintiff's case registered in the Magistrates' Court of Kuching as Summons No 72–930–97 and in the event that judgment is given in favour of the plaintiff in the said case, until a prohibitory order has been obtained and lodged against the said land.

In the present application, the second defendant took a loan of RM10,000 from the plaintiff with the promise to pay back within one month. The said loan was secured by a promissory note executed by the

second defendant as well as a pledge of the second defendant's land as described above. Pursuant to the said pledge given by the second defendant in writing, the plaintiff on 13 March 1997 lodged a caveat against the said land.

On 7 July 1997, the first defendant through the assistant registrar, issued a notice under s 178 of the Sarawak Land Code (Cap 81) to the plaintiff, indicating that an application for the registration of a memorandum of transfer had been made in respect of the said land. The abovesaid application was taken out by Messrs Tang & Tang and Wahap & Ngumbang Advocates on behalf of the second defendant and third defendant herein. As such, the caveat lodged by the plaintiff shall upon the expiration of the three months as stipulated in s 178, from the time the said notice was given to the plaintiff, be deemed to have lapsed, unless the plaintiff informed the first defendant within the said period of three months that an application for an order to the contrary has been made to the High Court. The plaintiff had on 5 November 1997 obtained an extension of time to serve the order as prayed for in the present application on the first defendant.

From the very outset, it must be noted that the objection to the present application of the plaintiff was taken up by the third defendant and not the second defendant, who is the registered proprietor and caveatee of the said land. Although both the plaintiff and the third defendant did not give any thought to this issue, this court is most concerned as to the legal standing of the third defendant in objecting to the extension of caveat sought by the plaintiff (see *Teng Hung Ping v Hoan Siew Choo & Ors* [1993] 2 CLJ 662 and *Cheong Kong Enterprise Co Sdn Bhd v Foong Seong Mines Ltd & Ors* [1969] 2 MLJ 246).

Be that as it may, it is not in dispute that the only pertinent issue in the present application is the question pertaining to the status of the pledge given by the second defendant. Due to its importance, the full text of the said pledge is reproduced as follows:

> Messrs Pau Ming Mortgage Sdn Bhd Date: 11 March 1997
> Lot 7404, First Floor
> Jalan Simpang Tiga, 93300 Kuching
>
> Dear Sirs
>
> *Loan of RM10,000*
>
> I, Chin Pak Chong (BIC K804112 now replaced by WN KP 620823-13-5377) of No 332 Lorong 4F, Tabuan Desa, 93350 Kuching, Sarawak, in consideration of your granting a loan of Ringgit Malaysia Ten Thousand Only (RM10,000) to me, which loan I have agreed with you to repay the same within one (1) month from the date of the full drawdown of the loan, I hereby pledge to you, as security, all my right title share and interest in all that parcel of land situated at Sungai Bakar, 27th Mile, Kuching/Serian Road, Serian, Sarawak containing an area of 6,799 square metres, more or less and described as Lot 478 Block 1 Bukar-Sadong Central Land District.
>
> For the purposes of this pledge and the loan, the word 'month' shall be construed to mean a period of thirty (30) days.

Yours sincerely

(sgd)

Chin Pak Chong (BIC K804112
now replaced by WN KP 620823–13–5377)

Witness (sgd)
K181236
(Benjamin Lim)

Learned counsel for the third defendant in objecting to this application submitted that the word 'pledge' as defined in the *Osborn's Concise Law Dictionary* (7th Ed) does not cover immovable property and as such, the plaintiff could not be said to have any caveatable interest in the said land. In futherance thereto, learned counsel for the third defendant also cited three cases for the reference of this court, namely *Ling Tee Huah Credit & Leasing Sdn Bhd & Ors v Lii Tat Credit Mortgage Sdn Bhd & Anor* [1990] 1 MLJ 58, *R & I Securities Sdn Bhd v Syarikat Tanaman dan Perusahaan Perak Sdn Bhd* [1988] 3 MLJ 41 and an unreported case of the High Court in Kuching, *Leie Siew Nyuk v Tong Kwong Feedmills Co Sdn Bhd* Originating Motion No KG 1 of 1984. Having analysed the abovesaid three cases, learned counsel for the third defendant concluded that in order for a caveat to subsist and come within the scope of s 173(a) of the Land Code, there must be a prevailing intention to create a charge. At this juncture, it is useful to refer to s 173(a) which provides that:

> Any person —
>
> (a) claiming to be entitled to or to be beneficially interested in any land, estate or interest under this Code by virtue of any unregistered agreement or other instrument or transmission, or of any trust express or implied or otherwise, howsoever, or by virtue of a licence issued pursuant to s 65B of the Forests Ordinance for the establishment of a planted forest; ...
>
> may at any time lodge with the Registrar a caveat in Form O in the First Schedule.

Interestingly, learned counsel for the plaintiff also urged this court to refer to the unreported case of *Leie Siew Nyuk v Tong Kwong Feedmills Co Sdn Bhd* and submitted that in view of the principles enunciated in the said case, the pledge given by the second defendant in the instant case should be deemed as 'unregistered agreement' and therefore would clearly come within the scope of s 173(a). In the abovesaid case, Tan Chiaw Thong J held that:

> In my view, the letter of guarantee in Chinese would appear to be sufficient to constitutes an 'unregistered agreement' within the definition of that expression in s 173(a) of the Land Code, and in this connection, I am proceeding on the basis that the word 'unregistered' refers to a document unregistered under the Land Code. I am of the view that prima facie, the Chinese version of the letter of guarantee, taken in the light of the affidavit in opposition relating to the deposit of the document of title of the said land by the applicant, and the execution of the Chinese version of the letter of

> guarantee by the applicant, constitutes an 'unregistered agreement' sufficient to enable the respondent to claim to be entitled to an interest in the said land in that, reading in particular cl 5 thereof, the English translation and the entry against the 'signature of guarantor', it would appear that they are sufficient to indicate an intention on the part of the applicant as buyer, and in the absence of a guarantor, to charge or *to offer the said land as security for the payment of the goods supplied to her under the said letter of guarantee.* (Emphasis added.)

In the instant case, it is clearly established that the second defendant expressly pledged his land to the plaintiff as security for the loan which the second defendant obtained from the plaintiff. It is no more a question of inference by this court to determine whether the documentary evidence in this case supported the fact that the second defendant 'offer the said land as security for' the repayment of the loan given to him. Indeed, this was his intention as shown in exh-4, annexed to the affidavit in support of Ee Poh Teck sworn on 2 September 1997. In addition, it is also pertinent to note that the second defendant had forwarded the land title in respect of the said land herein to the plaintiff for safe custody until the repayment of the loan. Hence, the pledge given by the second defendant would unmistakably constitute an 'unregistered agreement' as provided in s 173(a) of the Land Code, enabling the plaintiff to have a caveatable interest in the said land.

Apart from the foregoing reasons, this court is also of the view that the demands of justice would make it obligatory for the court to dismiss the objection of the third defendant. As explained earlier, the second defendant had expressly and unambiguously pledged his shares of the land to the plaintiff as security for the loan given to him by the plaintiff. The second defendant also forwarded the land title to the plaintiff for safe custody and given his permission to the plaintiff to caveat the said land. Now, for the third defendant to come to court at this point of time and to impute that the plaintiff has no caveatable interest would clearly undermine all the attributes of fairness and justice.

In the result, this court is of the view that there is no merit to the objection of the third defendant. The application of the plaintiff be allowed in terms of prayers (1) and (2). Costs of this application to be paid by the third defendant to be taxed unless agreed.

Application allowed.

Reported by Loo Lai Mee